No. 76-1701

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
MAY 31 1977
MICHAEL RODAK, JR., CLERK

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

HIRAM G. HILL, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Tennessee Valley Authority, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–21A) is reported at 549 F. 2d 1064. The opinion of the district court (App. B, *infra*, pp. 22A–44A) is reported in 419 F. Supp. 753.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 45A) was entered on January 31, 1977. On April 22, 1976, Mr. Justice Stewart extended the

time for filing a petition for a writ of certiorari to and including May 31, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, when a species is listed under the Endangered Species Act of 1973, a federal water project that is substantially finished may be completed and used despite its adverse effects on the species if Congress, with full knowledge of such effects, continues to approve the project by appropriating funds necessary for its completion.

2. Whether the Endangered Species Act applies to a project substantially completed at the time of its enactment.

STATUTES INVOLVED

Section 7 of the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536 provides:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act, by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened

> species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

STATEMENT

In 1966 Congress appropriated initial funds for the construction by the Tennessee Valley Authority ("TVA") of the Tellico Dam and Reservoir project, a federal multi-purpose dam and reservoir on the Little Tennessee River. Construction began in March 1967. The project has been funded annually thereafter and is now virtually completed and ready for use.

In August 1973, when the construction was half completed, a species of three-inch fish (later to be named the snail darter) was discovered in the stretch of the river scheduled to be impounded by the reservoir. (App. B, *infra*, pp. 25A, 33A.) [1]

In December 1973 the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 *et seq.*,

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[1] Darters, of which the snail darter is a type, are members of the perch family. There are about 130 known species of darters, 85 to 90 of which are found in Tennessee. Eight to ten new ones have been discovered in the last five years, and about twelve discovered in the last ten years. TVA's final environmental impact statement for the Tellico project (approved by the courts in *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn.), affirmed, 492 F. 2d 466 (C.A. 6)) listed eleven species of darters known to occur, or which may occur, in the portions of the Little Tennessee River to be impounded and noted that "new species continue to be discovered in Tennessee at the rate of about one per year."

was enacted. Section 7 of the Act, 16 U.S.C. (Supp. V) 1536, provides in relevant part that:

> [A]ll * * * federal departments and agencies shall, in consultation with and with the assistance of the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of this Act * * * by taking such action necessary to ensure that actions authorized, funded, or carried out by them do not * * * result in the destruction or modification of habitat of [species listed as endangered or threatened] which is determined by the Secretary * * * to be critical.

Subsequently respondents and others petitioned the Secretary of the Interior to list the snail darter as an endangered species pursuant to Section 4 of the Act, 16 U.S.C. (Supp. V) 1533. In November 1975, when approximately 75 percent of the construction was completed (App. B, *infra*, p. 33A), the Secretary designated the snail darter as an endangered species on the basis of his determination that the only known habitat of the fish was that portion of the Little Tennessee River scheduled to be impounded by the Tellico Reservoir and that "[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 40 Fed. Reg. 47306.[2] In April 1976

[2] This determination was based on the finding that "the snail darter occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival." *Ibid.*

the Secretary designated a portion of the River included within the area of the proposed reservoir as the snail darter's "critical habitat" pursuant to Section 7 of the Act. 41 Fed. Reg. 13926.

In February 1976 respondents filed this suit seeking to enjoin the completion of the dam and the impoundment of the reservoir, alleging that those actions would violate Sections 7 and 9 of the Act, 16 U.S.C. (Supp. V) 1536 and 1538.[3]

Prior to and during this litigation, TVA Board members testified before appropriations committees of the House and Senate. In hearings in April 1975 TVA informed those committees of the discovery of the snail darter and of efforts by opponents of the project to halt its completion by relying on the Endangered Species Act. TVA testified that in its view the Act did not prohibit the completion of a project authorized long before and substantially completed at the time the Act was passed, and stated that:

> [W]hile we will do our best to preserve the darter, if it in fact proves to be a distinct

[3] While respondents contended in both the district and appellate courts that the completion of the project would violate Section 9 of the Act, that question was not reached below (App. A, *infra*, pp. 9A, n.13). Section 9 makes it unlawful to "take any [endangered] species within the United States." Section 9 does not apply here, since in defining the term "take" in Section 3(14) of the Act, Congress deleted "the destruction, modification, or curtailment of its habitat or range" from the list of prohibited activities. Compare the original language of 3(6) of S. 1983, 93d Cong., 1st Sess. (1973), with Section 3(14) of the Act.

> species and is listed as endangered, the project should be completed in any event * * *.'

In recommending appropriations of $29 million for the project through September 1976, the House Committee on Appropriations, in its report dated June 20, 1975, stated

> The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest.'

The appropriations bill was passed by Congress and signed by the President in December 1975, one month after the snail darter was placed on the endangered species list. Pub. L. 94–180, 89 Stat. 1035, 1047.[6]

In appropriations hearings in March 1976 TVA again informed both the House and the Senate committees about the status of the snail darter and about the recently filed lawsuit, and reiterated its position that the Endangered Species Act should not be construed

[4] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess. Pt. 7, 467 (1975); see also Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1976 before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Pt. 4, 3775–3777 (1975).

[5] H.R. Rep. No. 94–319, 94th Cong., 1st Sess. 76 (1975).

[6] The appropriations acts in this case constituted lump sum appropriations for TVA, and do not themselves identify the projects for which the sums have been appropriated. Identification of these projects requires reference to the legislative history.

as prohibiting completion of the project.' In addition, respondent Hiram Hill appeared before the House Committee, and gave a lengthy statement severely criticizing the Tellico project and TVA's view of the Endangered Species Act, in which he concluded that "The project should be halted now and all unused funds for the project should be recalled" (Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Pt. 8, 979–984 (1976)).

With these statements before them, both the House and the Senate committees recommended the full Presidential budget request of $9.7 million for Tellico. In its report of June 17, 1976, the Senate committee made the following recommendation:

> TELLICO PROJECT
>
> The bill, as reported, contains the full $9.7 million budget request for the Tellico project.

[7] TVA stated to both committees: "We are doing our best to preserve the snail darter, and the results to date have been encouraging. We cannot guarantee that the [attempt to transplant the species to another river] will ultimately be a success. In any event, we believe the Tellico project must be completed on schedule." Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Pt. 5, 2[illegible]2 (1976); Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1977 before a Subcommittee of the Senate Appropriations Committee, 94th Cong., 2d Sess., Pt. 4, 3096–3099 (1976).

During subcommittee hearings, TVA was questioned about the relationship between the Tellico project's completion and the November 1975 listing of the snail darter (a small 3-inch fish which was discovered in 1973) as an endangered species under the Endangered Species Act. TVA informed the Committee that it was continuing its efforts to preserve the darter, while working towards the scheduled 1977 completion date. TVA repeated its view that the Endangered Species Act did not prevent the completion of the Tellico project, which has been under construction for nearly a decade. The subcommittee brought this matter, as well as the recent U.S. District Court's decision upholding TVA's decision to complete the project, to the attention of the full Committee. The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest. [S. Rep. No. 94–960, 94th Cong., 2d Sess. 96 (1976).]

The appropriation bill passed both houses of Congress on June 29 and was signed into law by the President on July 12, 1976. Pub. L. 94–355, 90 Stat. 889, 899.

The district court, on May 25, 1976, denied petitioner's request to enjoin the completion of the project and dismissed the complaint (App. B, *infra*). Although the court found that impoundment of the reservoir would "result in the adverse modification, if not complete destruction of the snail darter's critical habitat" (*id.* at 28A), it concluded that the Endangered Species Act was not intended to prohibit the completion of a project substantially complete when the Act was passed (App. B, *infra*, p. 36A). The court further held that "a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result" (*id.* at 36A–37A). The court found support for its view in Congress' continued appropriations for the project with full knowledge of its effect on the snail darter.

The court of appeals reversed (App. A, *infra*). The court held that the Endangered Species Act applies fully to this project, that the evidence indicated that completion of the project and impoundment of the reservoir would violate Section 7 of the Act, and that the district court abused its discretion in refusing to enjoin permanently the completion of the dam and the impoundment of the reservoir. The court refused to attribute any significance to the appropriations statutes of 1975 and 1976 or to the statements of the House and Senate committees directing the completion of the project "as promptly as possible in the public interest." The court held that those appropriations and statements did not constitute a "ratification" of the proposition that the Endangered Species Act was not intended to apply to the Tellico project, and that they were at best "advisory opinions" of certain members of Congress concerning the scope of the Act which could not bind the court "[i]f the separation of powers doctrine is to maintain its vitality" (App. A, *infra*, pp. 15A–16A).

At the time of the trial (April 29–30, 1976) approximately $80 million had been invested in the project and the project was 80 percent completed (App. B, *infra*, p. 33A). As the district court found (*id.* at 31A):

> The nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project.

TVA has undertaken steps to transplant the snail darter to another river and evidence to date indicates that the species is surviving and reproducing there.[7A] However, even a successful transplant would not resolve this case, since, unless the Secretary of the Interior also found the species to be no longer endangered, the Little Tennessee may continue to be a critical habitat of the species[8] (App. A, *infra*, p. 19A).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the proper application of the Endangered Species Act. Congress, in passing legislation after the Act, has explicitly, and with knowledge of the relevant facts, expressed an intention and directive that a specific federal project be completed notwithstanding the provisions of that Act. Contrary to principles

[7A] TVA introduced evidence at trial concerning its transplant efforts and made further, updated representations to the court of appeals in Supplemental Answers to Questions Asked During Oral Argument on the matter.

[8] Moreover, as TVA informed the court of appeals, "biologists generally consider several years of data necessary before they can form a conclusive judgment on the success of a transplant". TVA's Supplemental Answers to Questions Asked During Oral Argument, p. 2.

TVA has also petitioned the Secretary of the Interior to withdraw his designation of the Little Tennessee River as a critical habitat of the snail darter on the basis of recent evidence indicating that the very existence of the dam, even without closure of the sluice gates, has made it impossible for the fish to return through the sluices already in place to its spawning grounds above the dam. To date the Secretary has taken no action on the petition and steps have been taken to preserve the status quo by removing snail darters from the river below the dam and replacing them above the dam. Accordingly, it is impossible to predict how or when that petition will be resolved.

of statutory construction reflected in decisions of this Court and other courts of appeals, the court below disregarded that legislation and thus thwarted Congress' express intent.

The decision below has immediate consequences for the future of a major federal project, threatening not only the unrecoverable loss of millions of dollars already expended in its construction but also the loss of millions of dollars of annual energy production, flood control capacity and other economic benefits that the project was designed to bring to the people of the region. The decision would also have the broader consequence of restricting Congress' ability to limit, through appropriate legislation, the application of a general statute to a specific project where it specifically deemed such application to be contrary to the public interest, and would limit Congress in such cases to the more cumbersome and inappropriate legislative process of expressly amending or repealing the general statute.

The decision also presents important questions concerning the application of the Endangered Species Act to projects substantially complete at the time of its enactment, and the exercise by the courts of their traditional equitable powers under the Act.

1. a. The court of appeals concluded that the language of Section 7 of the Endangered Species Act prohibits the final completion of a project that threatens the critical habitat of an endangered species, and requires a federal court to enjoin such completion, regardless of the degree of completion of the project when the Act was passed, the district court's assessment of the propriety of an injunctive remedy, or the reasonableness of the responsible agency's evaluation of the public interest. Whether that was Congress' intention in passing the Act is an important and unsettled question, which we discuss below. See pp. 21–23, *infra*. Here, in any event, Congress subsequently expressed a contrary intention in legislation dealing specifically with the project at issue.

It is axiomatic that the function of the courts in construing legislation is to carry out the will of Congress as best it can be ascertained, and that courts may consider all available and relevant matters in discerning congressional intent. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10; *United States* v. *American Trucking Associations*, 310 U.S. 534, 543–544.

The legislative history of Congress' appropriations for TVA and the Tellico project could not more clearly demonstrate Congress' intent, with knowledge

of the relevant facts, that the project be completed as quickly as possible notwithstanding the Endangered Species Act. That intent is expressly set forth in committee reports of both Houses of Congress,[9] and, as this Court has recognized, statements in committee reports are entitled to particular weight in discerning the legislative will. *United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 585. The court of appeals, however, dismissed this explicit evidence of congressional intent as merely reflecting "[a]dvisory opinions" (App. A, *infra*, p. 15A), relying on the canon that "repeal by implication is disfavored," particularly when "the subsequent legislation is an appropriations measure" (App. A, *infra*, p. 16A). The court's disregard of Congress' stated intent is contrary to this Court's decision in *United States* v. *Dickerson*, 310 U.S. 554, and decisions of other courts of appeals concerning the effect of subsequent appropriations legislation on earlier statutes.

United States v. *Dickerson*, involved a 1922 statute authorizing and directing the payment of bonuses to servicemen who re-enlisted in the armed services. In 1938 Congress passed a rider to the appropriations bill for the Rural Electrification Administration that provided that "'no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment'

[9] The court of appeals erroneously characterized the statements in the committee reports "as pronouncements of two congressional appropriations subcommittees" (App. A, *infra*, p. 18A).

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[of any enlistment allowance] for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of [the 1922 Act].'" See 310 U.S. at 555. Although the 1938 appropriations measure did not expressly repeal the right to bonuses conferred by the 1922 statute for the 1939 fiscal year, the Court concluded, on the basis of its legislative history, that the measure was intended to suspend the right to bonuses for that year, and rejected the claimant's contention that the words of the appropriations act did not do so (310 U.S. at 562):

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words.* * * The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

The court of appeals for the Tenth Circuit applied those principles in *Friends of the Earth* v. *Armstrong*, 485 F. 2d 1 (C.A. 10), certiorari denied, 414 U.S. 1171. In that case a 1956 statute authorized the construction of the Glen Canyon Dam but prohibited the entry of any water from the resulting reservoir in any national park or monument, and directed the Secretary of the Interior to take adequate measures to protect the Rainbow Bridge National Monument. When it later appeared that the dam would cause water from Lake Powell to back up into the Monument, a 1962 appropriations act for the dam provided that "no part of the funds herein appropriated shall be available for construction or operation of facilities

to prevent waters of Lake Powell from entering any National Monument" (485 F. 2d at 7). Although 'he appropriations measure did not expressly repeal, or even refer to, the prohibition in the 1956 act, or prohibit efforts to contain the water, the court concluded that the legislative history of the appropriations measure indicated an intent to repeal the prohibition.[10]

The principles of those decisions are fully applicable here. The fact that Congress in the appropriations acts did not expressly exempt the Tellico project from the provisions of the Endangered Species Act should not preclude the courts from determining that those acts and their legislative history demonstrate Congress' intent that the project be completed notwithstanding its knowledge of the threat to the habitat of a species and the claim that because of that threat the Endangered Species Act prohibits its completion. To disregard that evidence, as the court of appeals did, is simply to override Congress' will in this matter.

b. The court of appeals erred in concluding that the statements in the committee reports were merely "advisory opinions" with respect to the meaning of

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[10] See, also, *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 492 F. 2d 1123 (C.A. 5), where the court held that Congress' passage of appropriations acts after being fully informed of the environmental effects of a project constituted an authorization to proceed with the project and foreclosed judicial inquiry into the adequacy of the impact statement under the National Environmental Policy Act. Cf. *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C.); *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A. 2), certiorari denied, 416 U.S. 936; and *DaCosta* v. *Laird*, 448 F. 2d 1368 (C.A. 2), certiorari denied, 405 U.S. 979, holding that continued appropriations and other actions necessary

the Endangered Species Act. Those statements were not simply expressions of personal opinion by isolated congressmen or senators concerning the meaning of a prior statute, *i.e.*, the kind of "subsequent legislative history" that this Court has found unpersuasive as evidence of Congress' intent when the statute was passed. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132. Rather they were statements in committee reports recommending specific legislation that Congress subsequently enacted, presumably in reliance thereon. The Senate Committee's expression of its intention in terms of not regarding "the Endangered Species Act as prohibiting the completion of the Tellico project" is immaterial. Its intent is clear that the Act *should* not prevent the completion of the project and that the project should "be completed as promptly as possible in the public interest"—a view Congress endorsed when it enacted further appropriations for that purpose."

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to maintain prosecution of the war in Vietnam reflected a congressional assent to the war notwithstanding the absence of a formal declaration.

" The court of appeals' reliance (App. A, *infra*, pp. 16A–17A) [illegible] on House Rule XXI, which provides that no appropriations bill "changing existing law [shall] be in order", is also erroneous. That rule merely permits a point of order to be raised and sustained with respect to appropriations legislation which affects existing law. It does not mean that appropriations legislation which does affect existing law is not effective legislation when, as here and as in *Dickerson*, *supra*, 310 U.S. at 558, n. 2, no point of order was raised. Indeed, the proposition that noncompliance with a House rule invalidates legislation passed pursuant to the constitutional process would raise a substantial constitutional question.

c. The court below also erred in disregarding the appropriations legislation on the basis of the canon that repeals by implication are disfavored. That canon of construction does not support the court's conclusion in the circumstances of this case.

It is, of course, well established that repeals by implication are disfavored and that—

> the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable * * * [W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.* * *

Morton v. *Mancari*, 417 U.S. 535, 550–551. Furthermore, "the principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169.

The present case, however, like *United States* v. *Dickerson*, *supra*, and *Friends of the Earth* v. *Armstrong*, *supra*, illustrates the circumstances in which "repeal by implication" (or, more accurately, "selective exemption") is fully warranted. Here the purpose of the appropriations and the effect of the Endangered Species Act, at least as contended by respondents and construed by the court of appeals, are mutually exclusive and wholly irreconcilable. This is not a case in which a statute imposes requirements with respect to the manner in which a project is carried

out (for example, equal employment practices, procurement procedures or environmental impact studies), which, although perhaps adding to the burden, do not make its implementation impossible. In this case, given the fact of the snail darter's habitat in the Little Tennessee River, completion of the project by the impounding of the river would be impossible under respondents' view of the Endangered Species Act.[17] Congress was aware of those facts and of respondents' claims under the Act when it directed the completion of the project "as promptly as possible" and appropriated funds for that purpose. In the circumstances of this case, therefore, to give effect to the alleged intent of the prior statute is necessarily to frustrate the purpose and intent of subsequent statutes.

Moreover, this is not a case where a general statute is claimed to implicitly repeal specific statutes, but a case of specific statutes implicitly exempting a particular project from the claimed operation of a prior general statute. Accordingly, as this Court has recognized, the usual considerations militating against repeal by implication are not present. *United States* v. *United Continental Tuna Corp.*, *supra*. Unlike the former situation, the very specificity of the subsequent statutes serves to ensure that Congress contem-

[17] As noted above, *supra*, p. 10, even a successful transplant of the species would not necessarily affect the designation of the Little Tennessee as one of its critical habitats, unless the species became so widespread as to warrant a determination by the Secretary of the Interior that it was no longer threatened or endangered.

plated and intended the particular consequences implicit in its legislation.

d. By mechanically rejecting the significance of appropriations legislation, notwithstanding its clear purpose, the court of appeals would deprive Congress of a reasonable and appropriate means of exempting a specific project from application of a general statute when Congress concludes that, in the particular circumstances, that application would not be in the public interest. Congress, of course, could have amended or repealed the Endangered Species Act, either in general terms or by establishing and periodically adding to a list of projects exempt from its provisions, and decisions like the one below may provide significant impetus for it to do so. But Congress should not be required to debate the general merits of the Endangered Species Act in the context of each specific situation in which it may deem an exception to that Act's consequences to be required. It is certainly reasonable, and arguably preferable, for Congress to choose to consider the pros and cons, including the environmental impacts, of a particular project in the context of a legislative proceeding focusing on the specific facts of that project rather than on the broader consequences of repealing or amending a general statute.[18] The choice is, in any event, a matter

[18] This is particularly true in the case of TVA which, unlike other federal agencies, does not obtain special authorizing legislation for its projects. Sections 4(j) and 27 of the Tennessee Valley Authority Act, 16 U.S.C. 831c(j) and 831z, are general authorizing statutes for such projects, and the appropriations committees alone recommend to Congress whether particular projects should or should not be built.

entrusted by the Constitution to the discretion of Congress rather than the courts. In short, by restricting Congress' alternatives, the court of appeals, far from honoring the principle of the separation of powers, has failed to give due deference to the Congress."

This question in this case concerning the effect of appropriations legislation on general commands in existing law has arisen in a number of contexts, particularly in recent years in connection with environmental legislation. While each case depends on its particular facts, the courts of appeals have taken significantly divergent approaches to the problem. Some, like the court below, appear to view appropriations legislation as virtually incompetent evidence of congressional intent. See *Committee For Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 785 (C.A.D.C.); *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F. 2d 346, 355 (C.A. 8). Others, applying the principles of *United States* v. *Dickerson*, *supra*, have recognized its relevance. See *Friends of the Earth* v. *Armstrong, supra; Environmental Defense Fund* v. *Corps of Engineers of the United*

[14] Although made in a markedly different context, the observations of the court of appeals in *Mitchell* v. *Laird*, 488 F. 2d 611, 615 (C.A.D.C.), are pertinent in this regard. In concluding that acts by Congress other than a formal declaration of war may adequately demonstrate legislative assent to the prosecution of hostilities, the court said: "[W]e regard the Constitution as contemplating various forms of Congressional assent, and we do not find any authority in the courts to require Congress to employ one rather than another form, if the form chosen by Congress be in itself constitutionally permissible."

States Army, supra. Accordingly, in view of the importance of the Tellico project itself and the recurrence of this question in other contexts, this Court should review the decision below.

2. Apart from the effect of subsequent legislation, the decision below presents important and unresolved questions under the Endangered Species Act.

Contrary to the court of appeals' conclusion, it is by no means clear that the language or purpose of the statute was intended to prevent an agency that has already "carried out" (Section 7) a program to its virtual completion when the Act was passed and a species listed from completing that project because the "completion" might modify the critical habitat of an endangered species. If, for example, construction of a highway were finished on the day the Act was passed, it is not clear that the Act was intended to prohibit the responsible agency from opening the highway to traffic the next day because the noise of the traffic might modify the critical habitat of a recently discovered endangered species. Although this is the first case to present that issue squarely under the Act, decisions under comparable statutes support the proposition that Congress did not intend such a construction. As the court said with respect to the National Environmental Policy Act in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1331 (C. A. 4), certiorari denied *sub nom. Fugate* v. *Arlington Coalition on Transportation*, 409 U.S. 1000:

> At some stage, federal action may be so "complete" that applying the Act could be con-

sidered a "retroactive" application not intended by Congress.[15]

Furthermore, both the statutory language and its legislative history suggest that in cases where a project cannot be "carried out" at all within the meaning of Section 7 without some modification of a critical habitat, the agency responsible for the project retains the responsibility (subject to review for abuse of discretion) for assessing the competing interests in light of the purposes of the Act.[16]

Finally, the district court here declined to enjoin completion of the project on the basis of its careful assessment of all the competing considerations, including the extent of the project's completion, TVA's good faith efforts to conserve the snail darter and

[15] See also, *Ragland* v. *Mueller*, 460 F. 2d 1196 (C.A. 5); *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 470 F. 2d 289 (C.A. 8), certiorari denied, 412 U.S. 931; *Pizitz, Inc.* v. *Volpe*, 467 F. 2d 208 (C.A. 5); *Greene County Planning Bd.* v. *Federal Power Commission*, 455 F. 2d 412, 424 (C.A. 2), certiorari denied, 409 U.S. 849; *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F. 2d 1164, 1179 (C.A. 6).

[16] See *e.g.*, 119 Cong. Rec. 25690 (1973), in which Senator Tunney, one of the sponsors of the Act, stated, "[A]s I read the language [of Section 7] there has to be consultation [between the agency and the Secretary of the Interior]. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built." *See also* the Department of the Interior's proposed regulations published January 26, 1977, to the effect that the Act was not intended to "bring about the waste that can occur if an advanced project is halted" and that the "affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with section 7." 42 Fed. Reg. 4869.

consult with other concerned agencies, and Congress' intent reflected in its continued appropriations. The court of appeals' determination that the district court abused its discretion presents the significant question whether Congress intended in the Act to deny the courts equitable discretion in deciding whether to grant injunctive remedies under the Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1977.

*The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-2116

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, THE AUDUBON COUNCIL OF TENNESSEE, INC., AND THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS, PLAINTIFFS-APPELLANTS

v.

TENNESSEE VALLEY AUTHORITY, DEFENDANTS-APPELLEES

Decided and Filed January 31, 1977

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges

CELEBREZZE, J., delivered the opinion of the Court, in which PECK, J., joined. MCCREE, J., (p. 19) filed a concurring opinion.

CELEBREZZE, Circuit Judge. For the third time in five years we are called upon to resolve a dispute between environmentalists and the Tennessee Valley Authority (TVA) over the legality of the Tellico Dam and Reservoir project. The issue on appeal in this instance is the propriety of the district court's denial of Appellants' request for a permanent injunction to prevent TVA from imminently closing the Tellico Dam. Appellants allege that the resulting reservoir will flood the only recognized habitat of the

snail darter, a rare protected species of river-dwelling fish, thereby jeopardizing its continued survival, in violation of §§ 7 and 9 of the Endangered Species Act of 1973.[1] 16 U.S.C. § 1531 *et seq.*

Tellico was initially proposed by TVA and ultimately approved by Congress in October, 1966, as a multipurpose, water resource and regional economic development project. It was primarily intended to benefit Blount, Loudon and Monroe Counties, Tennessee, "an area characterized by under-utilization of human resources and outmigration of young people." *Hearings before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess., at 261.

The engineering focus of the proposal was a concrete and earthfill dam to be situated near the mouth of the Little Tennessee River. This impoundment would create a navigable reservoir thirty-three miles long covering an area of 16,000 acres, including 2,100 acres of the existing river bed. Proponents of the project claimed that it would stimulate new shoreline industrial development, increase recreational opportunities and tourism, and augment existing hydroelectric power generating and flood control capabilities.[2] Congress agreed and in 1966 authorized initial Tellico project appropriations. Construction commenced in March, 1967. Closure of the dam is now scheduled to be completed in January, 1977.

For the present, the river remains free-flowing and Appellants seek to preserve it indefinitely in its

[1] 16 U.S.C. §§ 1536 and 1538(a)(1)(B) respectively.

[2] The Tellico Dam will have no electrical generators, but will contribute hydrostatic capacity to the existing TVA system via an 850 foot canal connecting the Tellico Reservoir with the Fort Loudon Reservoir.

present state as a natural resource.[3] TVA counters that it is the express will of the Congress that Tellico "be completed as promptly as possible in the public interest." S. Rep. No. 94-960, 94th Cong., 2d Sess. 96 (1976). TVA believes that such an unequivocal expression of congressional intent neutralizes any violation of the Endangered Species Act which may be involved in the impoundment of the river. We are therefore asked to balance the survival of a living species against the completion of a public works project which is more than 80% completed and represents a federal investment of almost ninety million dollars.

In 1971 and again in 1973, environmentalists and affected landowners petitioned the federal court seeking to forestall construction of the Tellico Dam on the ground that TVA had failed to comply with requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* They were successful in obtaining a preliminary injunction which halted project implementation for more than a year and a half,[4] affirmed by this Court in *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F. 2d 1164 (6th Cir. 1972), but the district court ultimately concluded that TVA's revised Tellico environmental impact statement fully complied with NEPA,[5] and we affirmed. *Environmental Defense*

[3] *Environmental Defense Fund* v. *Tennessee Valley Authority,* 339 F. Supp. 806, 809 (E.D. Tenn. 1972), summarizes in considerable detail the scenic historical, archeological and recreational attributes of the Little Tennessee River in its pristine state.

[4] *Id.*

[5] *Environmental Defense Fund* v. *Tennessee Valley Authority,* 371 F. Supp. 1004 (E.D. Tenn. 1973).

Fund v. *Tennessee Valley Authority*, 492 F. 2d 466 (6th Cir. 1974).

In August, 1973, a University of Tennessee ichthyologist discovered a unique and theretofore unknown species of fish, the snail darter (*Percina Imostoma tanasi*), thriving in the Little Tennessee River. This three-inch, tannish, bottom-dwelling member of the perch family, was found to feed upon fresh water snails (from whence its name was derived). In addition to providing the snail darter with a bountiful supply of its primary food, the river also maintained the oxygen levels required to sustain the species through aerating action of its rapidly flowing currents. The range of the snail darter's habitat encompossed seventeen miles of the river's course scheduled to be subsumed within the Tellico Reservoir. A search of other rivers of comparable ecology confirmed that the Little Tennessee was virtually the exclusive preserve of the world's snail darter population (recently estimated to number between 10,000 and 15,000 fish).[4]

On December 28, 1973, four months after the discovery of the snail darter, Congress passed the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* One of the Act's purposes was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ." 16 U.S.C. § 1531(b). Section 1533 of the Act empowered the Secretary of the Interior to compile and maintain separate official lists of threatened and

[4] TVA searched unsuccessfully for the species in 60 to 70 rivers in Alabama and Tennessee. Less than 70 specimens have been sighted downstream from the location of the Tellico Dam itself and none have been found above river mile 18 of the Little Tennessee.

endangered species.[7] Section 1536 unequivocally commits all federal agencies to:

> utilize their authorities in furtherance of the purposes of [the Act] by . . . taking such action necessary to *insure* that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical. (emphasis added).

Section 1540(g)(1)(A) authorizes suits by private citizens seeking "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof."

In January, 1975, several persons, including Appellants Hill and Plater, petitioned the Secretary of the Interior to add the snail darter to the endangered species list. Section 1533(c)(2). As part of the rule making procedure,[8] TVA was invited by the Department to comment. On November 10, 1975, over TVA's objections, the snail darter was designated as an endangered species primarily because of the threat posed by the Tellico project to destroy the species

[7] The snail darter is *not* one of the species over which the Secretary of commerce has "program responsibilities" pursuant to Reorganization Plan Number 4 of 1970. 16 U.S.C. § 1533(2).

[8] 16 U.S.C. § 1533(b) and the rule making provisions of the Administrative Procedure Act, 5 U.S.C. § 553, collectively define the procedures which the Secretary of the Interior must follow in maintaining the lists of threatened and endangered species. *See* 16 U.S.C. § 1533(f)(1).

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and its only known habitat.' 50 C.F.R. § 17.11(i) (1975); 40 Fed. Reg. 47505–47506 (1975). As required by § 1540(g)(2)(A)(i), Appellants notified both the Department of the Interior and TVA on October 20, 1975, that continued preparations to impound the Little Tennessee River would violate § 1536.

On February 28, 1976, Appellants brought suit in United States District Court for the Eastern District of Tennessee seeking to permanently enjoin completion of the dam. In April, the United States Fish and Wildlife Service, acting pursuant to rule making authority originally granted to the Secretary of the Interior in § 1536, designated river miles .5 to 17 as the "critical habitat" of the snail darter. 41 Fed. Reg. 13926–13928 (1976); *see* 50 C.F.R. § 17.81 (1970).[10] On April 29th and 30th a trial was held during which evidence was presented pertaining to whether the scheduled inundation of the Little Tennessee would jeopardize the species' continued survival. The Court also entertained argument on whether permanent injunctive relief would be appropriate to enforce compliance with the Act if the evidence made out a prima facie violation of §§ 1536 or 1538(a)(1)(B). In a memorandum opinion and Order dated May 25, 1976,[11] the court concluded:

> . . . the preponderance of the evidence demonstrates that closure of the Tellico Dam in January 1977 and the consequent creation of the Tellico Reservoir will result in the adverse modification, if not complete destruction, of the snail darter's critical habitat.[12]

[9] *See* 16 U.S.C. § 1533(a)(1) [factors (1) and (5)].

[10] "Critical habitat" is administratively defined by the Department of the Interior at 40 Fed. Reg. 17764–17765 (1975).

[11] *Hill et al.* v. *Tennessee Valley Authority*, Civil No. 3-76-48 (E.D. Tenn., May 25, 1976) [hereinafter cited as *Memorandum Opinion*]

However, the Court denied Appellants' prayer for a permanent injunction and dismissed the action based upon an analysis of the equities which it found to be controlling.

Appellants claim that the Court's refusal to impose an injunction was legally inconsistent with its finding of a blatant statutory violation. They contend that the Court clearly abused its discretion in light of express congressional recognition, in § 1540(g)(1)(A), of the appropriateness of injunctive relief to redress violations of the Act or of rules promulgated thereunder. They find no support within the language of the Act or its legislative history for exempting on-going projects from compliance, and therefore ask us to enforce the letter of the law by summarily halting Tellico Dam construction. Appellants argue that only Congress and the Secretary of the Interior have the power to relieve TVA of its obligations under the Act through enabling legislation or remedial rule making respectively. Our abiding interest in preserving the functional independence of the coordinate branches of government, as ordained by the constitutional separation of their enumerated powers, compels us to reverse the District Court and grant the relief requested. *Wilderness Society* v. *Morton*, 479 F. 2d 842, 892–893 (D.C. Cir. 1973).

Although this legal controversy may well enjoy a modicum of notoriety because it appears to pit the survival of an obscure fish against completion of a $100 million reservoir, the principles of law controlling [the case] are neither complex nor revolution-

[12] *Id* at 7–8.

ary." *Wilderness Society, supra,* at 891. Only three questions need be addressed:

(1) Does Tellico Dam completion violate the Endangered Species Act?

(2) Assuming a violation, are there adequate grounds for exempting Tellico from compliance?

(3) If no exemption is justified, is injunction the proper remedy to effectuate the purposes of the Act?

We are satisfied that TVA's continued preparations to dam the Little Tennessee violate § 1536 of the Endangered Species Act. The District Court concluded from the evidence at trial that "it is highly probable that closure of the Tellico Dam and the consequent impoundment of the river behind it will jeopardize the continued existence of the snail darter." TVA conceded that a significant portion of the designated "critical habitat" of the snail darter would be altered by conversion of the free-flowing river to a reservoir. The record supports Appellants' claim that the intrinsic environmental differences between river and reservoir bottom will inexorably destroy large numbers of snail darter eggs as well as inhibit the specie's spawning instinct. Therefore, the District Court properly determined that, because so few specimens have been found outside the critical habitat area, "the known population of snail darters will be significantly reduced if not completely extirpated . . ." by the drastic physical transformations to be accomplished by closure of the dam.

For reasons not obvious from the record, the District Court's opinion does not explicitly conclude that its factual findings constitute a prima facie violation

of § 1536.[13] We rectify this defect now by construing footnote 1 of the memorandum opinion as conclusive evidence that this was the intent of the Court.[14] In determining whether TVA's creation of the reservoir contravenes this section, the District Court appears to have relied upon an administrative definition of violative conduct by the Secretary of the Interior. Under this standard, an action affecting a designated critical habitat is deemed to be an offense if it,

> . . . might be expected to result in a reduction in the number or distribution of [the] species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or recovery of that species.

40 Fed. Reg. 17764–17765 (1975).

Although we are not compelled to follow agency constructions of a regulatory measure, courts have traditionally shown "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 308 U.S. 1, 16 (1964). Section 1536 conveys a pivotal role to the Secretary of the Interior to achieve voluntary com-

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[13] Because the district court concluded that closure of the Tellico Dam would violate Section 7, it did not consider whether the same state of facts also constituted a violation of Section 9 of the Act. 16 U.S.C. § 1538(a)(1)(B). *See* note 14 *infra.* We need not reach this issue because it does not alter the outcome of this appeal.

[14] "In light of this conclusion [that 'closure of the Tellico Dam and consequent creation of the Tellico reservoir will jeopardize the continued existence of the snail darter or destroy or modify the critical habitat thereof"], we do not deem it necessary to decide whether defendant's activities constitute an illegal "taking' of the species in violation of Section 9 of the Act." (citation omitted) Memorandum Opinion at 4 n. 1.

pliance with the policy objectives of the Act by federal agencies and departments whose programs may alter critical ecosystems. The Secretary is not empowered to veto the final actions of such agencies, even when he is convinced, after the requisite consultation has ensued, that they violate the Act, *National Wildlife Federation* v. *Coleman*, 529 F. 2d 359, 371 (5th Cir. 1976); *accord*, *Sierra Club* v. *Froehlke*, 534 F. 2d 1289, 1303 (8th Cir. 1976). However, his compliance standards may properly influence final judicial review of such actions, particularly as to technical matters committed by statute to his special expertise.

We find the Secretary's interpretation of § 1536 to be both reasonable and consistent with our reading of the Act's legislative history.[15] In the absence of conflicting judicial precedents, we see positive benefit to be gained by impressing his criteria with a judicial imprimatur. This will expedite the adjudication of future cases as well as assist the Secretary in achieving a uniform federal conservation posture with minimal reliance upon the courts. Applying this test to the District Court's findings of fact, we conclude that TVA's Tellico project operations violate § 1536.[16]

TVA concedes the existence of a predictable causal nexus between the impoundment of the Little Tennessee and the ultimate depletion of the snail darter population. This admission alone suffices to bring the affirmative action requirement of § 1536 into play. On appeal, however, TVA argues that closure of the

[15] *See 2 U.S. Code Cong. & Admin. News* 1973, 93rd Cong., 1st Sess., at 2988–3008.

[16] The Department of the Interior reached the same conclusion. *See* letter by Assistant Secretary Reed. Memorandum Opinion at 10.

Tellico Dam, as the last stage of a ten year project, falls outside the legitimate perview of the Act if it is rationally construed. TVA cautions that it would lead to absurd results if we were to include the terminal phases of on-going projects among the "actions" of departments and agencies to be scrutinized for compliance. We find this familiar line of reasoning unpersuasive and believe that the District Court erred in adopting it. *See Environmental Defense Fund* v. *Tennesse Valley Authority*, 468 F. 2d at 1177.

To countenance so restrictive a construction of § 1536, in the absence of positive reinforcement from the Act's legislative history, would, in our view, be inimical to achieving its objectives. We choose instead to give the term "actions" its plain meaning in the belief that this will best effectuate the will of the Congress.

The complexity of the ecological sciences suggests that the detrimental impact of a project upon an endangered species may not always be clearly perceived before construction is well underway. In effect, such was the case here. For Congress or the Secretary of the Interior to be able to make meaningful decisions in furtherance of the purposes of the Act, the opportunity to choose must be preserved. Once a living species has been eradicated, discretion loses its significance. Where a project is on-going and substantial resources have already been expended, the conflict between national incentives to conserve living things and the pragmatic momentum to complete the project on schedule is most incisive. Therefore, were we to deem the extent of project completion relevant in determining the coverage of the Act, we would effectively defeat responsible review in those cases in

which the alternatives are most sharply drawn and the required analysis most complex. This expedient strategy would frustrate effective enforcement of the Act and hinder efforts to prevent the wanton destruction of vulnerable species.

Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility under § 1540 (g)(1)(A) is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislation or executive branches sufficient opportunity to grapple with the alternatives.

The importance of this role is admirably demonstrated by a hypothetical situation postulated by the district court:

> If Plaintiff's argument were taken to its logical extreme, the Act would require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place.[17]

The district court dismissed this proposition out of hand as unreasonable and inconsistent with the intent of Congress. We disagree. Conscientious enforcement of the Act requires that it be taken to its logical extreme.

In *National Wildlife Federation* v. *Coleman*, 529 F. 2d 359 (5th Cir.) *cert. denied*, 45 LW 3397 (Nov. 30, 1976), for example, the welfare of the Mississippi Sandhill Crane was threatened by future construction of a 5.7 mile segment of Interstate Highway I–10 scheduled to traverse the Crane's designated critical habitat. Only 40 Sandhill Cranes are known to exist. Based upon the weight of the evidence, the Fifth Circuit reversed the district court's denial of injunctive relief and remanded the case with instructions that an injunction issue halting activities which might "jeopardize the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat" in violation of § 1536. *Id.* at 375. The injunction is to remain in effect until the Secretary of the Interior determines that modifications to the project will bring it into compliance with the Act.

[17] Memorandum Opinion at 23–24.

In assessing the potential adverse impact of the highway upon the Crane's habitat, the Fifth Circuit concluded that indirect effects such as accompanying private development were relevant factors. This broad reading of the protection afforded by § 1536 is consonant with our view. If injunctive relief is appropriate where extirpation of the species is not a predictable consequence of the violative activity, as in the Sandhill Crane case, it is unquestionably mandated here where eradication is a realistic possibility.

We reject as inapposite all but one of the NEPA cases cited by TVA in support of its on-going project exemption theory. In *Environmental Defense Fund* v. *Tennessee Valley Authority*, Judge McCree, speaking for this Court, held that, even if it were conceded that Tellico was a unified construction effort, a single "ball of wax" whose contours were known and approved by Congress prior to NEPA's effective date,

Tellico was not excused from full compliance with environmental impact statement requirements for on-going activities. 468 F. 2d at 1172. We find Judge McCree's expression of the congressional intent behind NEPA to be an accurate reflection of the pervading spirit of the Endangered Species Act:

> . . . Congress envisaged on-going agency attempts to minimize environmental harm caused by the implementation of agency programs. This could encompass not only *constant reevaluations of projects already begun* to determine whether alterations can be made in existing features or whether there are alternatives to proceeding with projects as initially planned, but also the consideration of the environmental impact of all proposed agency action. *Id.* at 1176 (emphasis added).

All of the other NEPA cases which waive compliance based upon advanced construction, *see e.g., Ragland* v. *Mueller,* 460 F. 2d 1196, 1198 (5th Cir. 1972); *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army,* 470 F. 2d 289, 301 (8th Cir. 1972), are readily distinguished by one fact which they all share: any judicial error in a NEPA case is subject to later review and remedial reversal before permanent damage is done to the environment. The same cannot be said for an erroneously granted exemption from the Endangered Species Act. If we were to err on the side of permissiveness here, and allow TVA to complete and close the dam as scheduled, the most eloquent argument would be of little consequence to an extinct species.

We conclude that the on-going nature of a project does not preclude enforcement of § 1536. *National Wildlife Federation* v. *Coleman, supra; Sierra Club* v. *Froehlke,* 534 F. 2d 1289, 1305 (8th Cir. 1976).[15] TVA has failed to take the necessary steps to insure that the impoundment of the Little Tennessee River will not jeopardize the survival of the snail darter or modify its habitat. We, therefore, find that continued work, directed toward impoundment, violates § 1536 of the Act. *See National Wildlife Federation* v. *Coleman, supra;* at 373.

We cannot condone non-compliance on the theory propounded by TVA that congressional approval of Tellico appropriations, upon full disclosure of the plight of the snail darter, constitutes legislative acquiescence in or express ratification of TVA's *laissez faire* interpretation of the Act. *See Hearings on Public Works for Water and Power Development Appropriation Bill, 1977, before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess. at 260–262 (1976). Advisory opinions by Congress concerning the "proper" application of an *existing* statute cannot influence our review because they lack the force of law. To credit them would be tantamount to permitting the legislature to invade a province reserved to the courts by Article III of the constitution. The meaning and spirit of the Act are clear on its face. We need not refer to legislative history to rationalize our independent assessment of its impact. *See e.g., United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *United States* v. *Jones,* No. 76–1189 at 9 (6th

[15] In *Sierra Club* v. *Froehlke* [the "Indiana Bat" case] the 8th Circuit implicitly conceded the applicability of the Act to an on-going dam construction project, but affirmed the district court's finding that the evidence was insufficient to make out a substantive violation of Sections 7 or 9.

Cir. Sept. 30, 1976). As the District of Columbia Circuit has said in a similar context:

> [I]t is well settled that repeal by implication is disfavored, and the doctrine applies with full vigor when, as here, the subsequent legislation is an appropriations measure, and when the prior Act is to continue in its general applicability, as construed by the courts, but the claim is made that it is to be subject to a particularized legislative exception. *Committee For Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 783, 785 (D.C. Cir. 1971) (footnotes omitted).

If the separation of powers doctrine is to retain its vitality, Congress must be free to appropriate funds for public works projects with the expectation that resulting executive action will pass judicial muster. *See Environmental Defense Fund, Inc.,* v. *Froehlke,* 473 F. 2d 346, 455 (8th Cir. 1972). Conversely, courts must defend their prerogative to apply the law as they find it "to require the Executive to abide by the limitations prescribed by the legislature." *Wilderness Society* v. *Morton, supra* at 892. Judge Skelly Wright, in commenting upon the imperative nature of this division of labor, has observed that:

> The scrupulous vindication of that principle of law, implicit in our form of government . . . and its basic checks and balance looms more important in the abiding public interest than the embarkation on any immediate or specific project, however desirable in and of itself, in contravention of that principle. *Id.*

Congress recognized the danger of bypassing plenary consideration of proposed modification to existing laws by adding amendments to appropriations bills. As the Eighth Circuit notes in *Environmental*

Defense Fund v. *Froehlke,* House Rule XXI is specific in providing that "no appropriation shall be reported in any general appropriation bill, . . . Nor shall any provision in any such bill or amendment thereto *changing existing law* be in order, . . ." 473 F. 2d 346, 354 (emphasis added).

TVA directs us to our own decision in *United States ex rel. TVA* v. *Two Tracts of Land,* 456 F. 2d 264 (6th Cir. 1972), as evidence of our reliance upon congressional spending decisions as indicia of legislative approval of the application of existing laws by the executive branch. This citation bespeaks a misapprehension of the significance of that case. It also ignores the relevance of our rejection in a more recent decision of TVA's argument that sustained congressional appropriations excused Tellico from full compliance with NEPA. *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F. 2d at 1182. In *Two Tracts* we viewed the continued financing of TVA's on-going land acquisition activities as implied ratification by Congress of a system of rules and regulations promulgated by TVA to give effect to enabling legislation which the Authority was charged with administering.[19] We found nothing in TVA's procedure which conflicted with reasonable attainment of that legislation's fundamental goals. Where a statute or executive order provides but the bare bones of a project authorization, leaving the administrative "flesh" to be added by an implementing authority, courts may properly interpret sustained

[19] The land was acquired for the Land Between the Lakes Project authorized by the President under authority conveyed by 16 U.S.C. § 831u (1964). The authority to condemn properties was vested in TVA by other subsections of that enabling legislation. 456 F. 2d at 267.

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congressional appropriations as some evidence that the evolving form of the project effectuates the original legislative intent.

In the instant case, however, TVA is neither charged with administering the Act nor is its conduct compatible with the measure's conservationist aims. In spite of this, TVA asks us to bow to the will of Congress as it may be construed from pronouncements of two congressional appropriations subcommittees.[20] As a court we cannot countenance such patent usurpation of legislative authority. Nor will we expurgate an important federal policy statute designed to foreclose all activities antithetic to the preservation of the "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" of vulnerable species of fish, wildlife and plants. 16 U.S.C. § 1531(3); *see United States* v. *Jones, supra,* at 21. We are fully in accord with the 4th Circuit's view, in *West Virginia Division of Izaak Walton League of America, Inc.* v. *Butz,* that:

> Economic exigencies . . . do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be . . . [T]he appropriate forum to resolve this complex and controversial issue is not the court's but the congress. 522 F. 2d 945, 955 (4th Cir. 1976).

With no cause to exempt the Tellico project from strict compliance with the Act, we find that the District Court abused its discretion in refusing to permanently enjoin all further actions by TVA which may detrimentally alter the critical habitat of the snail darter. We cannot accept TVA's contention that, even

[20] *See e.g., S. Rep.* 94–960, 94th Cong., 2d Sess. 96 (1976).

if Tellico completion is technically in violation of the law, halting further construction pending intervention by Congress or additional rule making by the Secretary of the Interior constitutes an inequitable remedy.

TVA claims to have done everything possible to save the snail darter, short of abandoning work on the dam. That alternative is deemed by TVA to be innately unreasonable. We do not agree. It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value.

We recognize that TVA has completed an experimental transplant of some 700 snail darter specimens from the Little Tennessee to the Hiwassee River which is of similar physical character. While we share the hope that conclusive evidence, not yet available, will confirm that the displaced population is thriving and reproducing, even if that evidence were properly before us, it would not alter our decision to enjoin further Tellico Dam construction. It is not the courts but the Secretary of the Interior who bears the responsibility for maintaining the endangered species list and the designating the critical habitats of listed species. The fact that both of these determinations are accomplished by rule-making rather than by adjudication confirms the public importance of the issues at stake. Nowhere in the Act are courts authorized to override the Secretary by arbitrarily "reading" species out of the endangered list or by redefining the boundaries of existing critical habitats on a case-by-case basis. The standard of judicial review of such

rule-making, defined in Section 706 of the Administrative Procedure Act, as interpreted in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 414 (1971), is restricted. It does not permit substitution of judgment. TVA will have to petition the Secretary if it wishes to attempt to blunt the impact of the Act by curative rule-making. So long as the snail darter remains on the endangered list and its critical habitat comprises miles .5 through 17 of the Little Tennessee River, we have no recourse but to enjoin creation of the reservoir.

Although we must reverse the district court's decision, we are sympathetic to its analysis of the equitable factors present here which would normally militate against granting injunctive relief. TVA has not acted in bad faith. Its efforts to preserve the snail darter appear to be reasonable.

As we have already demonstrated, only Congress or the Secretary of the Interior can properly exempt Tellico from compliance with the Act. The separation of powers doctrine is too fundamental a thread in our constitutional fabric for us to be tempted to preempt Congressional action in the name of equity or expediency.

The district court abused its discretion when it refused to enjoin a clear violation of federal law. As the Supreme Court has said in *Hecht* v. *Bowles,* 321 U.S. 321, 331 (1944); where the national policy objectives of a statute have been frustrated, ". . . the standards

[21] For an apt analysis of the appropriate scope of review of discretionary agency action, *see Sierra Club* v. *Froehlke*, *supra*, at 1304–1305. Here we have applied the *Overton Park* standard to find that, although TVA has acted within the scope of its authority, its decision to complete the Tellico Dam at the expense of the snail darter is "not in accordance with law." *Id.*

of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief . . ." *Accord, Securities & Exchange Commission* v. *Advance Growth Capital Corp.,* 470 F. 2d 40, 53 (7th Cir. 1972).

Therefore, we reverse the district court's order of dismissal and remand the cause with instructions that a permanent injunction issue halting all activities incident to the Tellico Project which may destroy or modify the critical habitat of the snail darter. This injunction shall remain in effect until Congress, by appropriate legislation, exempts Tellico from compliance with the Act, or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined.

Reversed and remanded.

McCREE, Circuit Judge (Concurring). I concur in the judgment of the court. The district court found that the completion of the Tellico dam would "jeopardize the continued existence of the snail darter," and, therefore, we must conclude that completion of the project would violate the Endangered Species Act. The Tellico dam project is not exempt from the provisions of the Act, either because it was begun before the Act was passed and before the snail darter was listed as an endangered species, or because a Congressional committee was aware of the fact that the snail darter would be threatened by completion of the dam when the Congress approved additional appropriations. I agree that the case should be remanded with instructions to issue an injunction forbidding project activity that would threaten the existence of the snail darter.

APPENDIX B

HIRAM G. HILL, JR., ET AL.
v.
TENNESSEE VALLEY AUTHORITY

Civ. No. 3-76-48

United States District Court, E. D. Tennessee, N. D.

May 25, 1976

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

Plaintiffs, The Association of Southeastern Biologists, the Audubon Council of Tennessee, Inc., Hiram G. Hill, Jr., Zygmunt J. B. Plater and Donald S. Cohen, seek to enjoin the completion of the Tellico Dam and consequent impoundment of the Little Tennessee River. Plaintiffs allege that defendant Tennessee Valley Authority [TVA], a wholly-owned corporation of the United States, is acting in violation of the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, by bulldozing and clear-cutting trees and foliage along the banks of the Little Tennessee River and by proceeding with plans to impound the river in January 1977.

Specifically, plaintiffs contend that TVA has violated § 7 of the Act (16 U.S.C. § 1536), which provides as follows:

"INTERAGENCY COOPERATION

"The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

Additionally, plaintiffs allege that TVA is acting in violation of § 9 of the Act (16 U.S.C. § 1538) which provides, in pertinent part, as follows:

"PROHIBITED ACTS—GENERALLY

"(a)(1) Except as provided in sections 1535 (g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

* * * * *

"(B) take any such species within the United States or the territorial sea of the United States;"

Section 1532(14) states as follows:

> "(14) the term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

See also § 1532(8).

On February 25, 1976, the Court denied defendant's motion to dismiss the complaint and denied plaintiffs' motion for a preliminary injunction prohibiting further work on the Tellico Project. Trial on the merits was held April 29 and 30 and at the conclusion of the evidence and arguments of counsel, both sides were given ten days to submit post-trial briefs.

Although six issues are set forth in the pre-trial order, the controlling ones in our judgment are as follows:

(1) Whether closure of the Tellico Dam and consequent creation of the Tellico reservoir will jeopardize the continued existence of the snail darter or destroy or modify the critical habitat thereof; and

(2) Whether the Endangered Species Act of 1973 requires that an injunction issue preventing completion of the Tellico Project.

For the reasons hereafter stated, we have concluded that the answer to the first issue is in the affirmative [1] and the answer to the other one is in the negative.[2]

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[1] In light of this conclusion, we do not deem it necessary to decide whether defendant's activities constitute an illegal "taking" of the species in violation of § 9 of the Act. *See* 16 U.S.C. § 1538(a)(1)(B); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1301 (8th Cir. 1976).

[2] Since this case involves novel questions of law, about which there may be differences of opinion, fairly detailed factual findings have been made despite the conclusion that the Act should not be construed as preventing completion of the project.

This controversy centers around a small, tannish-colored fish which is commonly known as the snail darter. Its name derives from the fact that it feeds primarily on small snails along the river bottom. It was discovered on August 12, 1973 by Dr. David A. Etnier, an ichthyologist and assistant professor of zoology at the University of Tennessee. Dr. Etnier discovered this new and distinct species at or near a place called Coyte Springs at approximately river mile 7 of the Little Tennessee River.[3] The snail darter, a member of the perch family, was scientifically described as *Percina* (*Imostoma*) *tanasi* by Dr. Etnier in the *Proceedings of the Biological Society of Washington*, Vol. 88, No. 44, pp. 469–488 (January 22, 1976).

On January 20, 1975 several persons, including plaintiffs Hill and Plater, petitioned the Secretary of the Department of Interior to list the snail darter as an endangered species pursuant to § 1533 of the Act. Thereafter, the Secretary invited interested persons, including TVA, to comment on a proposed rule-making to that effect. Although TVA and others objected to the proposal, the snail darter was placed on the endangered species list, effective November 10, 1975, on the ground that there was a present or threatened destruction of the snail darter or its habitat. *See* 16 U.S.C. § 1533(a)(1)(l); 50 C.F.R. § 17.11(i) (1975); 40 Fed. Reg. 47505–47506 (1975). In listing the snail darter as an endangered species, the Director of the Fish and Wildlife Service of the Department of the Interior noted that

> "In [the area between river miles .4 and 17 of the Little Tennessee River] the snail darter

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[3] Exhibit 2 is a map of the Tellico Project. All references to specific river miles are taken from it.

> occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival. The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 40 Fed. Reg. at 47506.

On or about October 20, 1975 plaintiffs notified the Department of Interior and TVA that further implementation of the Tellico Project would violate § 7 of the Act. This lawsuit was filed February 18, 1976.

On April, 1976, the United States Fish and Wildlife Service of the Department of the Interior designated river miles .5 to 17 as "critical habitat" for the snail darter, effective May 3, 1976. 41 Fed. Reg. 13926–13928 (1976). *See* 50 C.F.R. § 17.81 (1976).[4]

The evidence introduced at trial showed that the snail darter requires for its survival a clear, gravel substrate, in a large-to-medium, flowing river. The snail darter has a fairly high requirement for oxygen and since it tends to exist in the bottom of the river, the flowing water provides the necessary oxygen at greater depths. Reservoirs, unlike flowing rivers, tend to have a low oxygen content at greater depths.

Reservoirs also tend to have more silt on the bottom than flowing rivers, and this factor, combined with

[4] On April 22, 1975, the Department of Interior published its interpretation of "critical habitat" as it relates to § 7 of the Endangered Species Act. 40 Fed. Reg. 17764–17765. This interpretation states, *inter alia*, that critical habitat "could be the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species."

the lower oxygen content, would make it highly probable that snail darter eggs would smother in such an environment. Furthermore, the adult snail darters would probably find this type of reservoir environment unsuitable for spawning.

Another factor that would tend to make a reservoir habitat unsuitable for snail darters is that their primary source of food, snails, probably would not survive in such an environment.

Although TVA introduced evidence that about a dozen snail darters have been found outside of the critical habitat area and 50 or 60 of the species have been sighted at river miles .2 to .3, this does not alter the fact that river miles .5 to 17 of the Little Tennessee River constitutes a significant portion of the snail darter's range and is a critical habitat for the species.

It was undisputed at trial that the best estimates of the snail darter population are 10,000 to 15,000 and that this population is presently in the critical habitat area. All of the portion of the Little Tennessee River which is presently designated as critical habitat area will be inundated by the waters of the Tellico Reservoir, and the water depth at Coytee Springs, the place of the snail darter's discovery, will increase from its present depth of two or three feet to a depth of thirty or forty feet.

Although the snail darter may continue to exist for several years after the proposed impoundment, it is highly doubtful that it would reproduce in a reservoir environment. We conclude, therefore, that the preponderance of the evidence demonstrates that closure of the Tellico Dam in January 1977 and the consequent creation of the Tellico Reservoir will

result in the adverse modification, if not complete destruction, of the snail darter's critical habitat.[5]

As part of the program to conserve the snail darter, TVA has transplanted over 700 of the species to the Hiwassee River, which provides a habitat similar to that of the Little Tennessee. The evidence showed, however, that the transplant may or may not be successful since there is no conclusive proof that the 700 snail darters will reproduce in their new environment. Chances of reproduction in the new environment are slight according to Dr. Etnier.

As stated previously, TVA scientists have sighted 50 or 60 of the snail darters just downstream of the concrete portion of the dam at river miles .2 to .3. Also, 8 or 10 of the species have been sighted downstream from the mouth of the Little Tennessee River in Watts Bar Reservoir, including sightings at 4 and 10 miles downstream.

A TVA diver made what he termed a positive identification of two snail darters in the Chickamauga Reservoir below Watts Bar Dam and at a point some 85 river miles downstream from the mouth of the Little Tennessee. No specimens have been collected

[5] TVA concedes that a significant portion of the snail darter's presently known habitat will be altered or modified by the impoundment, but it denies that impoundment will result in total destruction of the snail darter. TVA's Trial Brief at 2. The Secretary of the Department of the Interior has indicated that a federal action affecting critical habitat would not comply with § 7 of the Act

> "if such an action might be expected to result in a reduction in the number or distribution of [the] species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or recovery of that species." 40 Fed. Reg. 17764–17765 (April 22, 1975).

from the Chickamauga Reservoir, however, and the visibility conditions were poor when the sighting was made.[6]

TVA has searched unsuccessfully in 60 or 70 other watercourses in Alabama and Tennessee looking for other populations of snail darters. It has also unsuccessfully searched the upper reaches of the Little Tennessee River (river miles 18 to 33) in search of the darter.

In light of the fact that so few of the species have been found in places other than the critical habitat area, we conclude that it is highly probable that closure of the Tellico Dam and the consequent impoundment of the river behind it will jeopardize the continued existence of the snail darter. Almost all of the known population of snail darters will be significally reduced if not completely extirpated, either due to the impoundment itself or the snail darter's potential loss of reproductive ability if it is unable to adapt to a new environment.

In a letter dated April 27, 1976 from Assistant Secretary Reed of the Department of the Interior addressed to Professor Plater, the following was stated:

> "Recent assertions that the snail darter exists elsewhere than in that portion of the Little Tennessee River declared to be critical habitat do nothing to change the [Fish and Wildlife] Service's position. The biological evidence remains that if the Little Tennessee

[6] The diver testified that he was at a depth of about 15′ when the sighting occurred and visibility was 3′ to 4′. He further testified that the total time elapsed during the sighting was about 15 seconds. Although the diver was not a trained ichythyologist, he was familiar with the snail darter's appearance.

River is impounded by Tellico Dam, the continued existence of the snail darter will be jeopardized and its critical habitat destroyed." Exhibit 33, p. 3.

The evidence shows that TVA has made a good faith effort to conserve the snail darter while carrying out its plans to complete the project. In December 1973, Dr. Etnier submitted a research proposal to TVA, requesting that it fund a biological study of the snail darter, including its life history and habitat. Dr. Etnier suggested that it might be possible to transplant the snail darter to other suitable river habitats, including the Hiwassee which he described as "the site most similar to the Little Tennessee River . . ." TVA concluded that such a program would be worthwhile, and contracted to fund a study by the University of Tennessee. Mr. Wayne Starnes, a graduate research assistant, undertook the study, which is still in the process of completion.

TVA undertook its own program in June 1975 to scientifically study the snail darter, attempt transplantation and search for new populations. TVA employs its own biologists in this study and has enlisted the assistance of outside consultants. The record shows that TVA has communicated frequently with the Fish and Wildlife Service and the State Wildlife Resources Agency about the snail darter. Several meetings have also been held with these agencies on the subject of the snail darter and its conservation.

Plaintiffs contend that TVA has not properly "consult[ed]" with the Department of Interior within the meaning of that term as used in § 7 of the Act. It is asserted that TVA has never seriously considered alternatives to completing the dam and impounding the river. Assuming this to be true, it is understandable

why TVA might take such a course of action. Completion of the dam and impoundment of the river are integral parts of a project begun almost a decade ago. TVA has been moving toward this goal since ground was first broken. When the snail darter was listed on the endangered species list in November 1975, TVA was fairly close to completion of the project which has been consistently funded by Congress since 1966.

The nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project. Modifications or alterations to the project cannot be made at this time which will insure compliance with the Endangered Species Act. Requiring TVA to consult with other agencies about alternatives not reasonably available to it would be to require TVA to perform a useless gesture.

TVA has continued work on the project under the supervision and direction of Congress. During congressional appropriation hearings involving the project, held in April and May 1975, TVA informed both the House and Senate committees that the snail darter had been discovered; that TVA did not construe the Endangered Species Act as preventing the completion of the project; that TVA believed the environmental consequences of the project had been fully disclosed;[7] and that TVA was attempting to preserve the darter

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[7] Although the final environmental impact statement did not mention the snail darter by name, it did discuss rater and endangered species of fish that would be affected by the project. Eleven species of darters were listed and it was noted that new species of the darter continued to be discovered in Tennessee at about the rate of one per year. Exhibit 114–B, pp. H–12–2, 3; Exhibit 114–A, p. 1–3–63.

but that the project should be completed in any event. *Hearings Before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 1st Sess., Pt. 7, at 467 (1976); *Senate Hearings Before the Comm. on Appropriations,* 94th Cong., 1st Sess., Pt. 4 at 3775–77 (1975).

After being so advised through its committees, Congress appropriated over $29 million for the project through September 1976. The appropriation bill was signed into law by the President on December 27, 1975—more than a month after the snail darter was placed on the endangered species list.

In recommending the appropriation, the House Committee on Appropriations stated as follows:

> "The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest." H.R. Rep. No. 94–319, 94th Cong., 1st Sess. 76 (1975).

During the latest congressional appropriation hearings in March of 1976, the Chairman of the House Committee asked TVA Chairman Wagner to comment on the litigation pending in connection with the snail darter. He stated, in part, as follows:

> "We informed both committees last year that TVA did not construe the Endangered Species Act as preventing completion of the Tellico Project; that we believed the environmental consequences of the Tellico Project had been fully disclosed; and that TVA was doing and would do its best to preserve the darter; but, in any event, that the project should be completed on schedule . . .

> "It is TVA's position that the ultimate decision to proceed with this project rests with TVA, and that TVA has acted responsibly, and in good faith in reaching its decision to complete the project. We believe that Congress did not intend the Endangered Species Act to be retroactively applied to existing projects like Tellico, which was over 50 percent complete at the time of the act's passage and the fish's discovery, and which was 70 to 80 percent complete at the time of the official listing of the snail darter as an endangered species. Even if applicable to Tellico, TVA construes section 7 of the Endangered Species Act to require Federal agencies to take reasonable measures, in consultation with the Secretary of the Interior, to conserve endangered or threatened species of fish, wildlife, and plants. The act was not intended to supplant an agency's primary responsibilities, or to repeal prior congressional approval and funding of authorized projects, such as Tellico, because the habitat of an endangered species would be altered or destroyed by completion of the project. TVA certainly does not construe the act as a mandate to halt an authorized project without regard to its stage of completion or the fact that $80 million in public funds had been appropriated by Congress and invested in a regional development project to provide flood control, navigation, hydroelectric power, water supply, and to produce other benefits, including recreation, fish and wildlife use, shoreline development, new job opportunities, industrial development, and to foster improved economic conditions in an area characterized by underutilization of human resources and outmigration of young people."

The entire statement is found in *Hearings Before a Subcomm. of the House Comm. on Appropriations,*

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94th Cong., 2d Sess., pt. 5, at 260–62 (1976). The identical statement was given to both the Senate and House committees.

The Tellico Project was authorized by Congress on October 15, 1966 as a multipurpose water resource and regional development project. It involves, among other things, the construction of a concrete and earth-fill dam which is to create a 16,500 acre reservoir at full-pool elevation on the lower 33 miles of the Little Tennessee River. As of March 31, 1976 the main dam, spillway and auxiliary dams were 85% complete, and the entire project was about 80% complete.

The long and controversial circumstances surrounding the Tellico Project need not be recounted here as the Court has outlined the history of the project in its earlier memorandum opinions which dealt with the adequacy of the environmental impact statement filed by TVA in connection with the project. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 339 F.Supp. 806 (E.D. Tenn.) *aff'd* 468 F. 2d 1164 (6 Cir. 1972); 371 F.Supp. 1004 (E.D. Tenn.) *aff'd* 492 F.2d 466 (6 Cir. 1974). The project has continued since work was first begun in 1967, except for the delays caused by the litigation mentioned above. In excess of $78 million in public funds have been invested in the project, and if it were permanently enjoined, TVA estimates that some $53 million would be lost in nonrecoverable obligations. Some $26 million would be recoverable from the land acquired and certain highway and bridge construction and some $20 to $23 million remain to be spent on the project.

One of plaintiffs' experts, an agricultural economist, testified that "only" $30 million of the $78 million expended to date would fall into the category of nonrecoverable obligations. This witness conceded on cross examination that he had only visited the project area one time in March 1976 and that he had spent only four or five hours in preparing his testimony. He also conceded that his analysis was limited to "ballpark figures"—with this we agree.

Although the evidence was conflicting on the recoverability of certain funds expended on new roads constructed in connection with the project, we are inclined to agree with defendant that these roads will lose most of their utility if the reservoir is not impounded.

The preponderance of the evidence indicates that the $53 million figure advanced by TVA is much more realistic than the estimate of nonrecoverable obligations advanced by plaintiffs.[8]

In respect to plaintiffs' allegation that the clear-cutting of trees and foliage along the banks of the river is posing a threat to the continued existence of the snail darter because of siltation, the preponderance of the evidence showed that these operations do not pose a present threat to the snail darter. TVA has made a reasonable effort to prevent siltation, and the silt load in the river is comparable to levels which existed prior to the present clear-cutting and bulldozing operations.

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[8] In pretrial proceedings, plaintiffs suggested that the project could be modified to make the project area into a public recreation area and the river could be left undisturbed. Thus, say plaintiffs, such a use would inure to the benefit of the public and reduce the loss if the project were abandoned. TVA pointed out, however, that the money appropriated to it was for the Tellico Project alone and that it had no authority to use the funds other than for that purpose.

In the Court's Bench Memorandum, denying plaintiffs' motion for a preliminary injunction, we stated as follows:

> "In the opinion of the Court, the Endangered Species Act does apply to the Tellico Project; but whether or not Congress intended the Endangered Species Act to permit halting of the Tellico Project after approximately $80 million has been spent on it is another question, a question that will not be answered by the Court at this time."

The Endangered Species Act of 1973 became effective on December 28, 1973 more than seven years after the Tellico Project was authorized by Congress and nearly seven years after construction began. At that time more than $45 million had been appropriated for the project and over $35 million had been invested in it. *Environmental Defense Fund v. Tennessee Valley Authority,* 371 F. Supp. 1004, 1006. The snail darter was discovered several months before this Court approved TVA's final environmental impact statement. It was not listed as an endangered species until November 1975 and its critical habitat was not determined until April 1976.

Under these circumstances, and others heretofore outlined, is it reasonable to conclude that Congress intended the Act to halt the Tellico Project at its present stage of completion? We think not. The Act should be construed in a reasonable manner to effectuate the legislative purpose. *Sierra Club v. Froehlke,* 534 F.2d 1289, 1304 (8th Cir. 1976).

At some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to

produce an unreasonable result. *Arlington Coalition on Transportation* v. *Volpe,* 458 F.2d 1323, 1331–32 (4th Cir.) *cert. den.* 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed.2d 261 (1972). Where there has been an irreversible and irretrievable commitment of resources by Congress to a project over a span of almost a decade, the Court should proceed with a great deal of circumspection.

As stated by the District Judge in *Froehlke, supra,* where

> "Congress has continuously funded the [project] for a number of years through various flood control acts, this Court will not substitute its judgment for that of the elected representatives of the United States." 392 F. Supp. 130, 144 (E.D.Mo. 1975), *aff'd* 534 F.2d 1289 (8th Cir. 1976).

The approach we have taken has been suggested or followed in a number of cases dealing with the applicability of the National Environmental Policy Act of 1969 to ongoing federal projects. *See, e.g., Pizitz* v. *Volpe,* 467 F.2d 208 (5th Cir. 1972); *Greene County Planning Board* v. *Federal Power Commission,* 455 F.2d 412, 424 (2d Cir.) *cert. den.* 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). In this connection, Judge Tuttle stated as follows in declining to apply NEPA to a highway project more than 80% complete when the Act was passed:

> "It is simply unreasonable to assume that Congress intended at this point in time, construction should halt, an environmental impact study should be made, and the highway possibly be rerouted." *Ragland* v. *Mueller,* 460 F.2d 1196, 1198 (5th. Cir. 1972).

This approach has also been suggested by a commentator. Wood, *Section 7 of the Endangered Species*

Act of 1973: A Significant Restriction for all Federal Activities, 5 E.L.R. 50189, 50196–97 (1975).

The Fish and Wildlife Service of the Department of the Interior has very recently promulgated guidelines to assist federal agencies in carrying out their responsibilities under § 7 of the Act. These guidelines along with a cover letter dated April 28, 1976 were introduced at trial as Exhibit 33. Part I.D. of the guidelines, entitled "Application of section 7 to Existing Activities and Programs" provides, in pertinent part, as follows:

> "In considering whether section 7 applies to actions in the . . . implementation stage but not completed prior to December 28, 1973, Federal agencies should determine if the action is . . . one being undertaken by . . . a Federal entity and substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If . . . such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied."

In construing a statute, the interpretation given it by an agency charged with administering it ordinarily must be given considerable weight. *Udall* v. *Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). In promulgating the guidelines, referred to above, however, the Service noted that they were intended as a "starting point" for the promulgation of regulations pursuant to normal rulemaking procedures which will afford interested parties the opportunity to comment on such proposed regulations. Further, the guidelines are to be used by federal agencies "at their discretion." Exhibit 33, pp. 2–3.

Thus, we do not take this guideline to be the Secretary's final statement of the manner in which § 7 is to be applied to ongoing projects. It may be that the guideline is directed toward ongoing projects which, with reasonable alterations, could be completed without violating § 7 of the Act. Perhaps the situation presented in this case is not contemplated by the guideline quoted above. At any rate, we are not inclined to give it much weight in its present tentative form.

We recognize the rule that congressional approval of appropriations does not, standing alone, repeal provisions of law in effect at the time the appropriations are approved. *Environmental Defense Fund* v. *Froehlke,* 473 F.2d 346, 353–54 (8th Cir. 1972); *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164, 1182 (6th Cir. 1972). Additionally, it is recognized that the critical habitat of the snail darter was not determined until April 1976 and that Congress has not acted on the appropriation requested in January 1976 which TVA plans to use to complete the project.

Nevertheless we believe that additional funding of the Tellico Project and a House Committee's direction to complete the project "in the public interest" after being informed by TVA that it did not construe the Endangered Species Act as preventing the project's completion is persuasive that such an interpretation of the Act is consistent with congressional intent. *Cf. Environmental Defense Fund, Inc.* v. *Corps of Engineers,* 492 F.2d 1123, 1140–41 (5th Cir. 1974); *United States ex rel. TVA* v. *Two Tracts of Land,* 456 F.2d 264, 267 (6th Cir.) *cert. den.* 409 U.S. 887, 93 S.Ct. 109, 34 L.Ed.2d 143 (1972). We are convinced that

Congress was thoroughly familiar with the project when additional appropriations were made since it had been dealing with the project over a number of years.

Plaintiffs rely on several recent cases dealing with the Endangered Species Act in support of their contention that the Act should be applied with full force and effect to the Tellico Project. The case of *United States* v. *Cappaert*, 508 F.2d 313 (9th Cir. 1974), *cert. granted* 422 U.S. 1041, 95 S.Ct. 2654, 45 L.Ed.2d 692 (1975) deals only tangentially with the Act and appears to turn on the interpretation and effect of a 1952 Presidential Proclamation. 508 F.2d at 320.

In *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir. 1976), the Act was applied to a highway project which began long before the Act became effective. The court enjoined further construction of a 5.7 mile segment of the highway which was to transverse the critical habitat of the Mississippi Sandhill Crane, an endangered species, pending a determination by the Secretary of the Department of Interior of what modifications are necessary to insure compliance with § 7 of the Act.

The plaintiffs in *Coleman* filed suit on May 23, 1975 and actual construction of the 5.7 mile segment in question did not begin until September 1, 1975, with a target completion date of May 29, 1978. Additionally, the plaintiffs did not seek a permanent injunction against construction of the highway.

Thus, the *Coleman* court was faced with a case that was fundamentally different on its facts from the present case. Construction of the 5.7 mile segment was in its initial stages and relatively minor alterations to the segment were all that was necessary to effectuate full compliance with § 7. Additionally, the Mississippi Sandhill Crane had been on the endangered list since June 3, 1973 pursuant to a predecessor to the present Act.[9]

As discussed previously, impoundment of the river is integral to the entire Tellico Project and it would serve no purpose to enjoin such action pending review by the Secretary of the Department of Interior to determine what modifications would bring the project into compliance with § 7. The Secretary has made his position clear that the proposed impoundment "would result in total destruction of the snail darter's habitat." 40 Fed.Reg. at 47506.[10]

In *Sierra Club* v. *Froehlke, supra*, the court affirmed the District Court's denial of injunctive relief in an action to halt construction of the Meramec Park Dam and other proposed dams in the Meramec Basin. The case dealt primarily with asserted violations of NEPA and the Endangered Species Act of 1973. The Indiana Bat was the endangered species involved.

The Court of Appeals affirmed the finding of the District Court that the evidence failed to show that "present activities in constructing the Meramec Park Reservoir are adversely affecting Indiana bats in the project area." *Froehlke, supra*, 534 F.2d at 1305.

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[9] Endangered Species Conservation Act of 1969, Pub. L. 91-135. For a discussion of the background of the present Act, see 2 U.S. Code Cong. & Admin. News, 2989-2992 (1973).

[10] The issuance of a permanent injunction in this case would have far more serious ramifications than in the ordinary case arising under NEPA. In that type of case the defendant agency can often be enjoined from further construction of a project pending compliance with the requirements of NEPA which are primarily procedural in nature.

The proof showed that only a very small number of the bats would be affected out of a total population of some 700,000.

Although the court did not deal directly with the question of the applicability of § 7 to ongoing projects, it is noted that actual construction on the project did not begin until July 1974. It is also noted that the project is not scheduled to be completed and operational until June of 1980, *Froehlke, supra,* 534 F.2d at 1293. Further, the Indiana Bat had been listed as endangered since 1966 under a predecessor to the present Act.[11]

Counsel for plaintiffs argues fervently that the Court has only limited discretion in determining whether or not an injunction should issue. It is asserted that the discretion of the Court is limited to fashioning a remedy to insure compliance with the Act, not to excuse a violation thereof. *See Hecht Co.* v. *Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944); *SEC* v. *Advance Growth Capital Corp.,* 470 F.2d 40 (7th Cir. 1972); *Shafer* v. *United States,* 229 F.2d 124 (4th Cir.), *cert. den.* 351 U.S. 931, 76 S.Ct. 788, 100 L.Ed. 1460 (1956). Since Congress has expressly declared the public interest in the Endangered Species Act, the argument continues, the failure to issue an injunction will frustrate the declared congressional objectives of the Act. We cannot agree.

This case must be viewed in the context of its particular facts and circumstances. We go no further than to hold that the Act does not operate in such a manner as to halt the completion of this particular

[11] Endangered Species Preservation Act of October 15, 1966 (Pub. L. 89-669).

project. A far different situation would be presented if the project were capable of reasonable modifications that would insure compliance with the Act or if the project had not been underway for nearly a decade.

If plaintiffs' argument were taken to its logical extreme, the Act would require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place. We cannot conceive that Congress intended such a result.

We are not suggesting that the Endangered Species Act should be administered grudgingly by the Courts, nor that the importance of any endangered species should be minimized when compared with an extensive federal project. Balancing such interests is a legislative and not a judicial function.[12]

Finally, we conclude that TVA has not acted arbitrarily, capriciously or otherwise not in accordance with the law in continuing further implementation of the Tellico Project. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). It has acted within the scope of authority given it by Congress and has informed Congress, through its committees, about the snail darter and its position on the application of the Endangered Species Act to the project.

[12] Plaintiffs also argue that the injunction should issue and the question would thereby be "remanded" to Congress for it to determine if the Tellico Project should be exempted from the Act. As pointed out previously, we think that Congress has already made it clear that the project should be completed. If we are mistaken in this conclusion, it is not too late for Congress to refuse to appropriate the funds to complete the project.

TVA has made a good faith effort to conserve the snail darter and has consulted with other agencies about the problem rather than taking the immutable position that it was not required to comply with the Act.

In holding that the Army Corps of Engineers had not acted arbitrarily or capriciously in its decision to build the Gillham Dam, the Court of Appeals for the Eighth Circuit stated as follows:

> "We have also taken into account, as we must, that the overall project was authorized by Congress eleven years prior to the passage of NEPA, and was sixty-three percent completed at the date this action was instituted. Almost ten million dollars has been expended and would be lost if the project were completely abandoned now." *Environmental Defense Fund v. Corps of Engineers,* 470 F. 2d 289 (1972) *cert. den.* 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973).

For the foregoing reasons, we conclude that plaintiffs' prayer for a permanent injunction must be denied and the action dismissed.

Order accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-2116

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, THE AUDUBON COUNCIL OF TENNESSEE, INC., AND THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS, PLAINTIFFS-APPELLANTS.

v.

TENNESSEE VALLEY AUTHORITY, DEFENDANTS-APPELLEES

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges

Filed: January 31, 1977

JUDGMENT

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issued out of said District Court if necessary.

Entered by order of the court.

s/JOHN P. HEHMAN.

U.S. GOVERNMENT PRINTING OFFICE: 1977